88-1993

NO. _____

IN THE
**Supreme Court of the United States**
October Term, 1988

ROBERT A. BUTTERWORTH, JR.,
Attorney General of the State of Florida, and

T. EDWARD AUSTIN, JR.,
as State Attorney to the Charlotte County, Florida,
Special Grand Jury,

*Petitioners,*

v.

MICHAEL SMITH,

*Respondent.*

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## QUESTION PRESENTED FOR REVIEW

Whether, consistent with the long tradition of secrecy surrounding grand jury proceedings, a state may prohibit witnesses appearing before a state grand jury from disclosing the nature of their testimony without violating the First Amendment to the United States Constitution.

## PARTIES TO THE PROCEEDINGS BELOW

The following is a list of all parties appearing in the proceedings before the United States Court of Appeals for the Eleventh Circuit who are petitioners or respondents before this Court:

Petitioners

Robert A. Butterworth
T. Edward Austin, Jr.

Respondent

Michael Smith



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## THE OPINIONS IN THE COURTS BELOW

The opinion sought to be reviewed is *Smith v. Butterworth*, 866 F. 2d 1381 (11th Cir. 1989), reversing *Smith v. Butterworth*, 678 F. Supp. 1552 (M.D. Fla. 1988). Both opinions are reprinted in the appendix accompanying the petition. References to the materials contained in the appendix will be made by the notation "(Pet. App. )." The court of appeals opinion appears at Pet. App. 2; the district Court opinion appears at Pet. App. 9.

## JURISDICTION

The decision of the court of appeals was entered on February 27, 1989. This petition has been filed and docketed within the period established by Supreme Court Rule 20 and 28 U.S.C. §2101(c).

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1). This case would have been subject to review by appeal under 28 U.S.C. §1254(2).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are:

United States Constitution, Amendment I:

> Congress shall make no law. . .abridging the freedom of speech,. . .

Section 905.27(1), Florida Statutes (1987):

> A grand juror, state attorney, assistant state attorney, reporter, stenographer, interpreter, or any other person appearing before the grand jury shall not disclose the testimony of a witness examined before the grand jury or other evidence received by it except when required by a court to disclose the testimony for the purpose of:
>
> (a) Ascertaining whether it is consistent with the testimony given by the witness before the court;



> b) Determining whether the witness is guilty of perjury; or
>
> (c) Furthering justice.

Section 905.27 (4), Florida Statutes (1987):

> Persons convicted of violating this section shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.083, or by fine not exceeding $5,000 or both.

Section 905.27 (5), Florida Statutes (1987):

> A violation of this section shall constitute criminal contempt of court.

## STATEMENT OF THE CASE

The courts below, based on the allegations of the complaint and matters submitted by the parties, found the following facts. (Pet. App. 4-5, 10-11).

On March 27, 1986, defendant below, T. Edward Austin as State Attorney assigned to the Charlotte County, Florida, Special Grand Jury, subpoenaed plaintiff Michael Smith, a reporter for the *Charlotte Herald-News*, to testify before a special grand jury investigating activities in the Charlotte County state attorney's office and the sheriff's department. At the time Smith testified, he was warned by Austin's staff that disclosure of his testimony in any manner was prohibited by Section 905.27, Florida Statutes (1987), and could result in criminal prosecution.

The special grand jury terminated its investigation in April, 1986. Smith wants to publish a news story and possibly a book about the subject matter of the special grand jury's investigation, including his observations of the process and the matters about which he testified; however, such disclosures would necessarily contain revelations prohibited by Section 905.27, Florida Statutes (1987).

Smith, concerned about being criminally prosecuted if he discloses in any manner his grand jury testimony without seeking relief from the grand jury's presiding judge, brought suit in the district court claiming the statute operates as an unconstitutional prior restraint and penal sanction on his First Amendment right of free speech.

The district court found the statute to be supported by "a compelling need for continued secrecy" in that it

> is designed to enhance Florida's ability to detect and eliminate organized criminal action by improving the evidence-gathering process. On deposition, witnesses for Defendant have described the policies behind Florida's statute. These reasons include the jurors' fear that their identities may somehow be disclosed, with resulting retaliation; impairment of a present investigation because witnesses are coached; and impairment of future investigations because the nature of the investigation is broadcast to future witnesses. There is also testimony that the media has greater access to the state courthouse in that the media may be present in the hall outside the grand jury room, unlike the federal courthouse, inside which cameras are not allowed.



678 F. Supp. at 1557. (Pet. App. 20).

Based in part on these findings, the district court granted defendants' motion for summary judgment.

The court of appeals agreed that the interests asserted by the defendants were legitimate; however, the appeals court concluded that these interests were not sufficiently compelling so as to overcome Smith's First Amendment claim.

Specifically, the appeals court held that Florida's statute barring witness disclosure of grand jury testimony runs afoul of the First Amendment when that statute is applied to witnesses who speak about the nature of their own grand jury testimony after the investigation has been completed.

## REASONS FOR GRANTING THE WRIT

### The Eleventh Circuit Court of Appeals Has Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

This court has not decided whether the First Amendment to the United States Constitution prohibits a state from structuring its criminal justice system so as to bar witnesses appearing before a state grand jury from disclosing the nature of their testimony, although approximately one-third of the states have laws prohibiting witnesses from disclosing their testimony before grand juries.

However, for the first time in American jurisprudence* a court—the United States Court of Appeals, Eleventh Circuit—has determined that when a state prohibits witnesses from disclosing the nature of their grand jury testimony after the investigation is completed, such state action is prohibited by the First Amendment.

In reaching this conclusion, the Court of Appeals disregarded this Court's admonition that secrecy surrounding grand jury proceedings does not end when a particular investigation is completed and supplanted the well-established primacy of grand jury secrecy with putative First Amendment considerations. The court also missapplied the rationale behind Rule 6 of the Federal Rules of Criminal Procedure and precluded Florida's judiciary from exercising power available to federal courts under Rule 6.

* The District Court found this case to be one "of first impression." 678 F.Supp. at 1557. (Pet. App. 19)



### I. Respondent's particularized speech and the First Amendment.

At the outset, it is important to address the type of speech for which respondent seeks protection, in light of the historical purpose of the First Amendment.

Without question, the protections for freedom of speech were fashioned to assure unfettered interchange of ideas for bringing about political and social changes desired by the people. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). To this end, the central commitment of this amendment forbidding abridgement of freedom of speech is that debate on public issues be uninhibited, robust, and wide open. *Bond v. Floyd*, 379 U.S. 536 (1965). The preservation of the uninhibited marketplace of ideas in which truth will ultimately prevail lies at the cornerstone of the First Amendment. *Red Lion Broadcasting Co. v. F. C. C.*, 395 U.S. 367 (1974).

Contrasted with the rich history of the First Amendment is respondent's desire to disclose the nature of his Florida grand jury testimony for possible economic benefit. In this light, several factors must be taken into account in considering respondent's First Amendment claim.

First, respondent's status as a news reporter does not accord him any special status as to the gathering and disclosure of information above that enjoyed by any member of the public. *Pell v. Procunier*, 417 U.S. 817 (1974); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Zemel v. Rusk*, 381 U.S. 1 (1965). He was subpoenaed to appear as a grand jury witness to provide information necessary to the investigation and not to gather material for publication.

Second, where speech has as its impetus an economic foundation, such speech is accorded a lesser degree of protection than other types of constitutionally-protected expression designed to foster debate on public issues. *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980). Respondent represents that the disclosure he seeks under the First Amendment involves the possibility of writing a book containing the nature of his grand jury testimony. (Pet. App. 31).Yet, he offers no indication of the testimony he wishes to disclose.

Third, where speech and conduct are joined in a single course of action, First Amendment values must be balanced against competing societal interests. *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986). Respondent's disclosural speech is inextricably intertwined with a commercial book-publishing motive (and the operation of Florida's grand jury system as well). Accordingly, his First Amendment claim must be balanced against competing societal interests.

It is submitted that this balance was properly done in the district court, only to be cast aside by the Eleventh Circuit Court of Appeals.

Both lower courts addressed competing claims of "compelling state interest" and "least restrictive means." The inherent difficulty in applying such tests was the subject of Justice Blackmun's concurring opinion in *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, at 188-189 (1979):

> . . . , I add these comments to record purposefully, and perhaps somewhat belatedly, my unrelieved discomfort with what seems to be a continuing tendency in this Court to use as tests such easy



> phrases as "compelling [state] interest" and "least drastic [or restrictive] means." [Citation omitted.] I have never been able fully to appreciate just what a "compelling state interest" is. If it means "convincingly controlling," or "incapable of being overcome" upon any balancing process, then, of course, the test merely announces an inevitable result, and the test is no test at all. And, for me, "least drastic means" is a slippery slope and also the signal of the result the Court has chosen to reach. A judge would be unimaginative indeed if he could not come up with something a little less "drastic" or a little less "restrictive" in almost any situation, and thereby enable himself to vote to strike legislation down. This is reminiscent of the Court's indulgence, a few decades ago, in substantive due process in the economic area as a means of nullification.
>
> I feel, therefore, and have always felt, that these phrases are really not very helpful for constitutional analysis. They are too convenient and result oriented, and I must endeavor to dissassociate myself from them.

This exact language was quoted by Justice Stevens this year in *Eu v. San Francisco County Democratic Central Committee*, Case No. 87-1269; _____ U.S. _____(1989).

**II. The primacy of grand jury secrecy.**

> The grand jury serves the dual function of assuring that where there is probable cause to believe a person has committed a crime, that person will be prosecuted, and of protecting those against whom there is no such evidence from being prose-

> cuted and having to stand trial. *The grand jury has broad investigatory powers not only to inquire into violations of criminal law but also into all phases of the civil administration of government.* (Emphasis supplied.)

*Smith v. Butterworth*, 678 F. Supp. 1552, 1555 (M. D. Fla. 1988). (Pet. App. 15).

The deference accorded grand jury proceedings is particularized in *United States v. Sells Engineering, Inc.*, 463 U.S.418 (1983) wherein the Court declared that secrecy of grand jury proceedings lies at the heart of its ability to function as the great bulwark of our nation's criminal justice system. In a long line of cases, this Court has consistently reaffirmed the "long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts." *United States v. Procter & Gamble Co.*, 356 U.S. 67, 681 (1958). *See, e.g., Dennis v. United States*, 384 U.S. 855 (1966); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959).

In *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211, 218-219 (1979), this Court said:

> We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings. [Citation omitted.] In particular, we have noted several distinct interests served by safeguarding the confidentiality of grand jury proceedings. First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify



> fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those to be indicted would flee, or would try to influence the individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

In addition to these well-recognized compelling interests justifying grand jury secrecy, there are those specifically recognized by the court of appeals here as follows:

> Present and future investigations would be undermined... if witnesses were permitted to divulge the nature of their testimony. The effectiveness of the grand jury system itself would be impaired if jurors were not completely assured that their identities would remain unknown. Finally,... confidence in the grand jury as an institution would be undermined if the identities of those investigated but not indicted were revealed.

866 F.2d at 1320. (Pet. App. 6).

Both the district and circuit courts were fully apprised of the unrefuted concerns regarding the harm a witness could do by portraying the thrust of a grand jury inquiry, identifying an innocent person as the target of an investigation, or publicizing information that is to be the subject of further grand jury inquiry. These concerns are exacerbated by the specter of inaccurate or erroneous unchecked disclosures by witnesses.

It must be recognized that the grand jury receives its information by and from witness testimony. From the disclosure of the nature of witness testimony the recipient may

glean the nature and thrust of the inquiry, the nature and scope of the questions, and the scope and substance of the discussions — all taking place before the grand jury. The potential for disclosural error and for jeopardizing future grand jury inquiries as a direct result of uncontrolled disclosure of grand jury testimony by witnesses requires rejection of the opinion of the Eleventh Circuit.

The subject of permanent secrecy of grand jury testimony is not new to this Court or to our jurisprudence generally. In Calkins, *Grand Jury Secrecy*, 63 Mich.L.Rev. 455, 460-465, 484-485 (1965), the author questions the permanency of such secrecy. However, his analysis is based on his view of the grand jury as an indictment body, thereby overlooking the role of the grand jury as the possessor of "broad investigatory powers...into all phases of the civil administration of government." 678 F. Supp at 1555. (Pet. App. 15). Moreover, nowhere in his analysis does the author address the impact of disclosure on future grand jury inquiries. Finally, the author's concern that permanent secrecy of grand jury testimony will insulate that witness from accountability is vitiated by Section 905.27(1), Florida Statutes (1987), under attack here, for this statute properly reposes in the judiciary the power to open up grand jury proceedings for the purpose of

1. ascertaining whether the grand jury testimony is consistent with testimony offered in court;

2. determining perjury; and

3. furthering justice.

Florida's grand jury statute is in harmony with the primacy of grand jury secrecy subject to judicial supervision. *See In Re Jessup's Petition*, 136 A. 2d 207 (Del. 1957) for a



cogent discussion of the grand jury's historical role. The relationship between grand jury secrecy and judicial supervision of grand jury proceedings is explicated in *State v. Drayton*, 226 So.2d 469 (Fla. 1969). The effect of the decision under scrutiny here is to cast aside judicial supervision of grand jury proceedings in an artificial manner—once an investigation is completed—regardless of whether the need for secrecy remains viable. In so holding, the Eleventh Circuit casts aside hundreds of years of unbroken tradition and law.

In recognition of the primacy of grand jury secrecy, this Court has declared that the "indispensable secrecy of grand jury proceedings ... must not be broken except where there is a compelling necessity." *United States v. Procter & Gamble Co.*, 356 U.S. at 682. The Eleventh Circuit, in contravention of this admonition, found that "a compelling necessity" exists upon the claim of the respondent that his right to publish his experiences as a grand jury witness was protected by the First Amendment.

It its effort to avoid the impact of this Court's "compelling necessity" requirement in order to overcome the blanket of secrecy covering grand jury proceedings, the Eleventh Circuit cites to the singular fact that the particular grand jury investigation was completed. However, in *Douglas Oil of California v. Petrol Stops Northwest*, 441 U.S. at 222, this Court points out that the "interests in grand jury secrecy, although reduced, are not eliminated merely because the grand jury has ended its activities."

In *Minton v. State*, 113 So. 2d 361, 365 (Fla. 1959), the Supreme Court of Florida addressed the subject of disclosure of grand jury proceedings upon conclusion of a particular investigation as follows:

> While, in a given case, the reason for secrecy may no longer obtain, the effect on subsequent grand jury proceedings — on jurors, on witnesses, on the privacy of the system itself — of indiscriminate disclosure has been said to be "of greater moment." *United States v. General Motors*, D.C. Del. 1954, 15 F.R.D. 486, 488.

The Court of Appeals specifically recognizes the legitimacy of the state's concerns that future investigations may be compromised or impaired by witnesses' disclosure of their testimony upon completion of a particular investigation; however, the Court of Appeals did not take into account this Court's recognition of the vitality of grand jury secrecy even after a particular grand jury has completed an investigation.

In April, 1988 the Eleventh Circuit recognized the "historically and presumptively secret" nature of grand jury proceedings. In *Phillips v. United States*, 843 F. 2d 438, 441 (11th Cir. 1988), the court said:

> Grand jury proceedings, both state and federal, have long been protected by the veil of secrecy. The secrecy of the grand jury is sacrosanct.

Notwithstanding the "sacrosanct" nature of grand jury secrecy recognized by this Court and the court of appeals, the Eleventh Circuit in 1989 here supplanted the sanctity surrounding grand jury proceedings upon a bare claim that disclosure of the testimony of a witness was protected by the First Amendment. In support of this shift, the Circuit Court misapplied the rationale justifying Rule 6(e) of the Federal Rules of the Criminal Procedure.



## III. Fed. R. Crim.P. 6(e)

In support of its position, the Eleventh Circuit cites to the advisory committee note to Rule 6(e) claiming that "(t)he seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice." 866 F.2d at 1320. (Pet. App. 7) The remainder of the committee's note, however, reveals that the "unnecessary hardship" and "injustice" to which the committee refers exist, if at all, only when "a witness is not permitted to make a disclosure to counsel or to an associate." 678 F. Supp. at 1558. (Pet. App. 23). There is no language in the committee's note to Rule 6(e) which equates disclosure for the enumerated limited purposes with blanket public disclosure under a First Amendment claim. Indeed, it is recognized that the federal rule is not based on First Amendment considerations. 678 F. 2d at 1558. (Pet. App. 23)

The federal courts have repeatedly recognized that, even under Rule 6(e), circumstances may exist which would justify some restrictions on disclosure by witnesses. In *In re: Swearingen Aviation Corporation*, 486 F.Supp. 9, 10-11 (D.C. Mo. 1979), the court emphasized the primacy of secrecy surrounding grand jury proceedings and the necessity for judicial control and supervision of grand jury proceedings under the federal rule:

> The language of Rule 6(e) appears on its face to be absolute and to prevent the issuance of any type of order imposing an obligation of secrecy on a witness. Before Rule 6(e) was enacted, the practice of most federal courts was to require grand jury witnesses to take oaths of secrecy. *Goodman v. United States*, 108 F.2d 516, 518 (9th Cir. 1939); *United States v. Central Supply Association*, 34 F.Supp. 241, 245 n. 2 (N.D. Ohio 1940). This practice was upheld as "within the discretionary power of the court. . . if the court believes the precaution

necessary in the investigation of crime." *Goodman*, 108 F.2d at 520; *see Central Supply Association*, 34 F.Supp. at 245.. . . *However, other courts have recognized that there are circumstances in which some restriction on disclosures by grand jury witnesses may be appropriate despite the language of Rule 6(e). In re: Grand Jury Summoned October 12, 1970*, 321 F.Supp. 238, 240 (N.D. Ohio 1970); *King v. Jones*, 319 F.Supp. 653, 657-659 (N.D. Ohio 1970), *rev'd on other grounds*, 453 F.Supp. 478 (6th Cir. 1971), vacated as moot, 405 U.S. 911, 92 S. Ct. 956, 30 L Ed. 2d 780 (1972); *In Re: Grand Jury Witness Subpoenas*, 370 F.Supp. 1282, 1285 n. 5 (S.D. Fla. 1974). *The Court does not believe that this provision was intended to prevent the imposition of an obligation of secrecy upon grand jury witnesses where necessary to protect the legitimate investigative function of the grand jury. To hold otherwise would render a court powerless to preserve the integrity of the judicial process. . . .Thus the court has the power and the duty to maintain the integrity of the investigative processes of the grand jury, and Rule 6(e) should not be read to command inaction when the circumstances require that it act.* (Emphasis supplied.)

The above graphically demonstrates that even under Rule 6(e), the primacy of grand jury secrecy and judicial supervision over grand jury proceedings remain viable, and include court-supervised restrictions on disclosure by grand jury witnesses.

Although Rule 6(e) permits federal judges to order witnesses not to disclose their grand jury testimony, the Court of Appeals decision would take such power away from the Florida judiciary by permitting the witness to disclose without any judicial supervision over, or checks upon, such



revelation. The power of Florida's judiciary to prevent a grand jury witness from disclosing the nature of his testimony once a particular investigation is completed stands in stark contrast to this Court's analysis in *Douglas Oil Company*, 441 U.S. at 222, wherein this Court concluded that such disclosure could have an effect upon the functioning of future grand juries in that persons called upon to testify will be influenced by the likelihood that their testimony may one day be disclosed to outside parties. This abridgement of grand jury secrecy could easily be accomplished by examining the disclosure made by a particular witness; from that disclosure, one may be able to determine the nature of the investigation, the questions asked, and the nature of discussions between members of the grand jury and among the prosecuting attorney and members of the grand jury. These are legitimate concerns recognized by both the district court and the circuit court of appeals, yet found to be wanting by the Eleventh Circuit as against respondent's First Amendment claim.

It must be recognized that under Florida's statute, Smith has a vehicle to seek and obtain judicial review of his claim—he could have petitioned the judge presiding over the grand jury for permission to publish his testimony, and describe what he intended to disclose. However, he chose not to do this.

Finally, the Eleventh Circuit relies on *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), declaring that decision similar to the one at bar. However, that reliance is misplaced as *Landmark Communications* does not involve a constitutional challenge to a state's power to keep grand jury proceedings confidential or to punish participants for a breach of that mandate. This Court, in *Landmark Communications*, did not equate proceedings before a state judicial review commission with those before a grand

jury. The two are not analogous. Unlike a state judicial review commission, secrecy is essential to grand jury proceedings which may investigate both criminal activities and all phases of the civil administration of government. Secrecy is not only a matter of tradition, but also of necessity. As the district court said at 678 F. Supp. at 1555 (Pet. App. 16):

> The institution of the grand jury was recognized in the Magna Carta by England's King John in 1215 A.D. In its inception, the grand jury functioned to augment the centralized power of the Crown by acting as a public prosecutor. Gradually, the grand jury developed independence of action from the Crown. This was accomplished by enclosing its proceedings in a veil of secrecy, which insulated the jurors from the pressures of the Crown and permitted it to guard the people against the oppressive power of autocratic government.
>
> Grand jury proceedings have been closed to the public since the 17th century, and records of such proceedings have been kept from the public eye.

## CONCLUSION

When considered in light of this Court's decisions establishing a long-standing tradition of grand jury secrecy and the policy considerations behind Rule 6(e), the decision of the Eleventh Circuit of Appeals is in error. By the Eleventh Circuit's decision, a tradition steeped in American jurisprudence has been cast aside despite the fact that this Court and others have recognized that the termination of one investigation does not necessarily mean that the testimony gathered during that investigation may not generate further investigations. In light of the significance of this critical issue in American jurisprudence, we respectfully request that this Petition for Writ of Certiorari be granted.



Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petition for Writ of Certiorari was served in accordance with Rule 28.1 of the Rules of the Supreme Court of the United States by depositing three true copies in the United States post office mailbox, with first-class postage prepaid, addressed to:

Gregg D. Thomas
Post Office Box 1288
Tampa, FL 33602

_____/s/_____
GEORGE L. WAAS

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NO. _____

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IN THE
# Supreme Court of the United States
October Term, 1988

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ROBERT A. BUTTERWORTH, JR.,
Attorney General of the State of Florida, and

T. EDWARD AUSTIN, JR.,
as State Attorney to the Charlotte County, Florida,
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## APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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MICHAEL SMITH,

*Plaintiff/Appellant,*

v.

ROBERT A. BUTTERWORTH, JR.,

T. EDWARD AUSTIN, JR., as
State Attorney to the
Charlotte County Special Grand Jury,

*Defendants/Appellees.*

No. 88-3097

**United States Court of Appeals, Eleventh Circuit.**

Feb. 27, 1989.

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Reporter, who had been called to testify before special grand jury and wished to publish a news story and possibly a book about the subject matter of the investigation brought suit seeking declaration that statute proscribing disclosure of grand jury testimony unconstitutional and seeking injunction against prosecution. The United States District Court for the Middle District of Florida, 678 F.Supp. 1552, No. 87-143-Civ-FTM-17B, Elizabeth A. Kovachevich, J., granted defendants' motion for summary judgment, and reporter appealed. The Court of Appeals, Vance, Circuit Judge, held that statute proscribing disclosure of grand jury testimony violated First Amendment insofar as it applied to witnesses speaking about nature of their own grand jury testimony after investigation has been completed.

Reversed and remanded.



Appeal from the United States District Court for the Middle District of Florida.

Before VANCE and KRAVITCH, Circuit Judges and HENDERSON, Senior Circuit Judge.

VANCE, Circuit Judge:

Plaintiff Michael Smith appeals from the district court's entry of summary judgment for defendants. We reverse.

Appellant is a reporter for the *Charlotte Herald-News* in Charlotte County, Florida. On March 27, 1986, appellee T. Edward Austin, Jr., state attorney for Duval County and special prosecutor, called Smith to testify before a special grand jury investigating allegations of corruption in the Charlotte County state attorney's office and the sheriff's department. When Smith testified, Austin's staff warned him that any disclosure of his testimony would violate chapter 905.27 of the Florida Statutes. That statute provides in relevant part that

> (1) A grand juror, . . . reporter, . . . or any other person appearing before the grand jury shall not disclose the testimony of a witness examined before the grand jury. . . except when required by a court to disclose the testimony for the purpose of:
>
> (a) Ascertaining whether it is consistent with the testimony given by the witness before the court;
>
> (b) Determining whether the witness is guilty of perjury; or

(c) Furthering justice.

(2) It is unlawful for any person knowingly to publish, broadcast, disclose, divulge, or communicate to any other person . . . any testimony of a witness examined before the grand jury, or the content, gist, or import thereof. . . .

Fla. Stat. 905.27 (1985)(emphasis added). Any person who violates the statute is guilty of a first degree misdemeanor. §905.27(4). A violation also constitutes criminal contempt. §905.27(5).

The grand jury terminated its investigation in April 1986. Smith now wants to publish a news story and possibly a book about the subject matter of the special grand jury's investigation, including what he observed of the process and the matters about which he testified. On November 18, 1987, Smith brought an action for declaratory and injunctive relief, requesting the district court to declare the statute to be an abridgment of speech in violation of the first amendment. He also sought to enjoin the state from prosecuting him under the statute, alleging that prosecution would deprive him of his first amendment rights under color of state law. The court granted defendants' motion for summary judgment, holding that the permanent and total nondisclosure of grand jury testimony was necessary to achieve the state's interest in preserving the efficacy of grand jury proceedings, and that this interest sufficiently outweighed appellant's rights under the first amendment. 678 F.Supp. 1552.

Appellant argues that section 905.27 is unconstitutionally overbroad, in that it prohibits *any* person appearing before the grand jury from *ever* disclosing matters testified to, even long after the investigation is terminated. The question



presented by this appeal thus is a narrow one. We are not addressing the legitimacy of a statute which penalizes disclosure by grand jurors, court reporters, or other persons who acquire information by virtue of their official participation in grand jury proceedings; nor are we faced with a statute that precludes witnesses from divulging the nature of their testimony during the course of an ongoing investigation. Rather, we address the constitutionality of a state statute that imposes on witnesses appearing before the grand jury a permanent and absolute obligation of secrecy and makes violations of that obligation criminally punishable.

[1] We note at the outset that the freedom of speech afforded by the first amendment is not absolute. *Whitney v. California*, 274 U.S. 357, 371, 47 S.Ct. 641, 646, 71 L.Ed. 1095 (1927); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571, 62 S.Ct. 766, 768, 86 L.Ed. 1031 (1942). Legislation that penalizes the publication of truthful information, however, seldom can satisfy constitutional standards, *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 102, 99 S.Ct. 2667, 2670, 61 L.Ed.2d 399 (1979), and "requires the highest form of state interest to sustain its validity." *Id.* at 102, 99 S.Ct. at 2670. Even where a sufficiently compelling state interest can be shown, those arguing in favor of a regulation's validity must further demonstrate that its goal cannot be achieved by means that do not infringe as significantly on first amendment rights. *Minneapolis Star & Tribune Co. v.*

*Minnesota Comm'r of Revenue,* 460 U.S. 575, 587 n.7, 103 S.Ct. 1365, 1372 n. 7, 75 L.Ed.2d 295(1983).[1]

Appellees maintain that several important governmental interests are promoted by the permanent and absolute ban on disclosure. Present and future investigations would be undermined, they contend, if witnesses were permitted to divulge the nature of their testimony. The effectiveness of the grand jury system itself would be impaired if jurors were not completely assured that their identities would remain unknown. Finally, appellees argue that confidence in the grand jury as an institution would be undermined if the identities of those investigated but not indicted were revealed. While we acknowledge that these interests are legitimate, we do not view them as sufficiently compelling to justify the criminal punishment of any person, including a witness, who divulges the content of grand jury testimony.

The statute at issue is similar to one challenged in *Landmark Communications, Inc. v. Virginia,* 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978). A newspaper publisher in that case was convicted under a state law proscribing the disclosure of information pertaining to proceedings before the state judicial review commission. While recognizing that "confidentiality promotes the effectiveness of this mode of scrutinizing judicial conduct and integrity," *id.* at 836, 98 S.Ct. At 1540, the Court concluded that "the publication Virginia seeks to punish under its statute lies near the core of the First Amendment, and the Commonwealth's interests

1 Whether the statute operates as a prior restraint or rather constitutes a penal sanction for publishing truthful, lawfully obtained information makes no difference. Both require the most compelling state interest to sustain their validity. *Daily Mail,* 443 U.S. at 101-02, 99 S.Ct. at 2669-70.



advanced by the imposition of criminal sanctions are insufficient to justify the actual and potential encroachments on freedom of speech and of the press which follow therefrom." *Id.* at 838, 98 S.Ct. at 1541.

Appellees argue that the long tradition of secrecy surrounding grand jury proceedings serves to distinguish the Florida statute from the Virginia law addressed in *Landmark.* While it is true that courts have long recognized the need for grand jury secrecy, *see Douglas Oil Co. of California v. Petrol Stops Northwest,* 441 U.S. 211, 218 n. 9, 99 S.Ct. 1667, 1667 n. 9, 60 L.Ed.2d 156 (1979), the rule of secrecy has not always been extended to witnesses. Fed.R.Crim.P. 6(e), for example, which codifies the traditional rule of secrecy, *United States v. Sells Eng'g, Inc.* 463 U.S. 418, 425, 103 S.Ct. 3133, 3138, 77 L.Ed.2d 743 (1983), does not impose an unqualified obligation of secrecy on witnesses. The advisory committee note explains that "[t]he seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice. . . ." Fed.R.Crim.P. 6(e) advisory committee's note. The federal rule reflects a determination that the effectiveness of the grand jury function can be ensured absent application of the rule to witnesses. Although the federal rule is not binding on any state, it illustrates that Florida's goal of preserving the integrity of grand jury proceedings can be achieved without the imposition of a blanket prohibition on disclosure.

We thus conclude that section 905.27 is unconstitutional insofar as it applies to witnesses who speak about the nature of their own grand jury testimony after the investigation has been completed. We reject, however, appellant's assertion that the statute must be stricken in its entirety. This case is "governed by the normal rule that partial, rather than facial, invalidation is the required course." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504, 105 S.Ct. 2794, 2802,

86 L.Ed.2d 394 (1985). Partial invalidation is proper unless it would be contrary to legislative intent in the sense that the legislature would not have passed the statute without the invalid portion. *Id.* at 506, 105 S.Ct. at 2803. The challenged statute contains a severability clause,[2] and under Florida law, "[a]n unconstitutional portion of a general law may be deleted and the remainder allowed to stand if the unconstitutional provision can be logically separated from the remaining valid provisions, that is, if the legislative purpose expressed in the valid provisions can be accomplished independently of those [provisions] which are void. . . ." *Presbyterian Homes of Synod v. Wood,* 297 So.2d 556, 559 (Fla. 1974). The remainder of the statute accomplishes the legislature's general intent of enhancing the integrity of the grand jury system by providing for the confidentiality of the proceedings. We therefore hold that the provisions of Section 905.27 prohibiting "any other person" from disclosing the nature of grand jury testimony are unconstitutional to the extent that they apply to witnesses who speak about their own testimony after the grand jury investigation is terminated.

The order of the district court granting defendants' motion for summary judgment is reversed and the cause is remanded to the district court for proceedings consistent with this opinion.

REVERSED AND REMANDED.

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2 1939 Fla.Laws 19554 318.



MICHAEL SMITH,

*Plaintiff,*

v.

ROBERT A. BUTTERWORTH, JR.,
Attorney General of the State of Florida, and

T. EDWARD AUSTIN, Jr., as
State Attorney assigned to the
Charlotte County Special Grand Jury,

*Defendants.*

No. 87-143-Civ-FTM-17

## United States District Court, M.D. Florida, Tampa Division

Feb. 2, 1988.

Grand jury witness challenged constitutionality of Florida statute which prohibited him from publishing account of grand jury's investigation. The District Court, Kovachevich, J., held that Florida statute prohibiting disclosure of grand jury witnesses's testimony permissibly infringed on witness' First Amendment right.

Summary judgment for state.

## ORDER

KOVACHEVICH, District Judge.

This cause is before the Court on plaintiff's motion for preliminary injunction, defendants' motion to dismiss or motion for summary judgment, defendants' supplement, and plaintiff's supplement.

## FACTS:

Plaintiff Michael Smith ("Smith") is a professional reporter employed by the Punta Gorda Herald, Inc., publisher of the *Charlotte Herald-News*, a newspaper distributed in Charlotte County, Florida. Smith was subpoenaed and did testify before a Charlotte Special Grand Jury on March 27, 1986.

The Special Grand Jury, which was convened to investigate claims of questionable activities and operations in the Charlotte County state attorney's office and police department, terminated its activity in April of 1986. At the time of his testimony, Smith was warned by members of the staff of T. Edward Austin ("Austin"), who were specially-assigned by the Governor to oversee the Special Grand Jury's investigation, not to reveal his testimony in any manner, because such revelation could result in criminal prosecution.

Smith wants to report and publish a news story or book about activities of the state attorney's office which had become controversial during the year prior to his being subpoenaed. Any report or book would necessarily contain revelations prohibited by Section 905.27, Florida Statutes (1985)("the Section" or "Section 905.27") because Smith intends to base his account, in part, upon his testimony and experience before the Special Grand Jury. Smith is concerned that, if he publishes any of the questions addressed to him or his answers, he will be criminally prosecuted pursuant to Section 905.27.



Smith brings this action seeking declaratory and injunctive relief in order to acquire this Court's judgment that Section 905.27 presents an unconstitutional prior restraint and penal sanction on his First Amendment rights of free speech under the United States Constitution. Smith seeks this relief under 42 U.S.C. §1983 to prevent the State's enforcement of the Section against him, so that he might pursue his intention to document his story concerning government activities in Charlotte County in recent years.

This circuit clearly holds that summary judgment should only be entered when the moving part has sustained its burden of showing the absence of a genuine issue as to any material fact when all the evidence is viewed in the light most favorable to the nonmoving party. *Sweat v. The Miller Brewing Co.*, 708 F.2d 655 (11th Cir.1983). All doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. *Hayden v. First National Bank of Mt. Pleasant*, 595 F.2d 994, 996-7, (5th Cir. 1979), quoting *Gross v. Southern Railroad Co.*, 414 F.2d 292 (5th Cir.1969). Factual disputes preclude summary judgment.

The Supreme Court of the United States held, in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986),

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at

trial. *Id.* [477 U.S. at ___, 106 S.Ct. at 2552, 91 L.Ed.2d] at 273.

The Court also said, "Rule 56(e) therefore requires the moving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing there is a genuine issue for trial.'" *Celotex Corp.*, at 477 U.S. p. ___, 106 S.Ct. p. 2553, 91 L.Ed.2d p. 274. The Court is satisfied that no factual disputes remain for resolution at trial. This case presents a purely legal question.

## SCOPE OF JUDICIAL REVIEW

[1] The power to declare a law unconstitutional exists only when it is necessary to enforce or protect some constitutional right. *State ex rel. Crim v. Juvenal,* 118 Fla. 487, 159 So. 663 (1935). The Constitution itself must be found to be violated. . . . If the act does not violate the United States or State Constitution, it must be given effect. *Dutton Phosphate Co. v. Priest,* 67 Fla. 370, 65 So. 282 (1914).

Courts do not have the power to rule upon the policy or wisdom of the law. *Fraternal Order of Police, Metro Dade County, Lodge No. 6 v. Dep't of State,* 392 So.2d 1296 (Fla.1980). Any questions as to the need or appropriateness of a particular enactment are for the legislature. *Stern v. Miller,* 348 So.2d 303 (Fla.1977).

[2] Every law is presumed valid. *Bunnell v. State,* 453 So.2d 808 (Fla.1984). To be defective, the law must be clearly erroneous, arbitrary, and wholly unwarranted. *State v. State Bd. of Education of Florida,* 467 So.2d 294 (Fla.1985). In determining the validity of a statute, if possible, the courts must give it a construction that will uphold the act. *Miami Dolphins, Ltd. v. Metropolitan Dade County,* 394 So.2d 981 (Fla.1981); and if any doubt exists about the validity of the



act, all doubt will be resolved in favor of the constitutionality of the statute. *Falco v. State,* 407 So.2d 203 (Fla.1981).

[3] Since there is the presumption in favor of the validity of a statute, the burden of proving that a statute is unconstitutional is upon the party challenging the act. *Peoples Bank of Indian River County v. State, Dep't of Banking & Finance,* 395 So.2d 521 (Fla.1981). The challenging party, who has the burden of proof, has to prove "beyond all reasonable doubt" that the challenged act is in conflict with some designated provision of the Constitution. *Metropolitan Dade County v. Bridges,* 402 So.2d 411 (Fla.1981). In particular, when the legislature makes a determination that the law has a public purpose, the party challenging the determination must show that the legislative determination was so clearly wrong that it was beyond the power of the legislature to act. *State v. Orange County Indus. Development Authority,* 417 So.2d 949 (Fla.1982).

When a court looks at a law to see if the facts support the law, "if any state of fact, known or to be assumed, justifies the law, the court's power of inquiry ends; questions as to the wisdom, need or appropriateness are for the legislature." *Fulford v. Graham,* 418 So.2d 1204, 1205 (Fla. 1st DCA 1982), citing *State v. Bales,* 343 So.2d 9 (Fla.1977).

In determining facial unconstitutionality, the Florida Supreme Court has established the following test:

> [T]he vice of constitutional invalidity must inhere in the very terms of the title or body of the act. If this cannot be made to appear from argument deduced from its terms or from matters of which the court can take judicial knowledge, we will not go beyond the face of the act to seek grounds for holding it invalid.

*Crandon v. Hazlett*, 157 Fla. 574, 26 So. 648, 643 (1946), quoting *State v. Armstrong*, 127 Fla. 170, 172 So. 861, 862 (1937)(Terrell. J.).

## THE FIRST AMENDMENT

Plaintiff argues that the State of Florida cannot demonstrate a compelling governmental interest in nondisclosure by grand jury witnesses, or that Section 905.27 is narrowly tailored to further that interest, and no more restrictive than necessary. Plaintiff asserts that the State's permanent and total refusal to allow a witness, compelled by subpoena to testify in a grand jury proceeding, to later speak about his testimony, undermines the basic role of the First Amendment.

The Supreme Court has often enunciated that role:

> Fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. The right of free speech, the right to teach, and the right of assembly are, of course, fundamental rights. These may not be denied or abridged. But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction is required in order to protect the State from destruction or from serious injury, political, economic or moral. That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent has been settled. See *Schenk v. United States*. [Citation omitted]



> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. *Whitney v. California*, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095 (1927).

## THE FIFTH AMENDMENT

The framers of the Constitution also recognized the institution of the grand jury, providing in the Fifth Amendment that no one can be prosecuted for a capital crime unless the grand jury decides that the evidence it has heard requires such prosecution. The grand jury serves the dual function of assuring that where there is probable cause to believe a person has committed the crime, that person will be prosecuted, and of protecting those against whom there is no such evidence from being prosecuted and having to stand trial. The grand jury has broad investigative powers not only to inquire into violations of criminal law but also into all phases of the civil administration of government.

The institution of the grand jury was recognized in the Magna Carta granted by England's King John in 1215 A.D. In its inception, the grand jury functioned to augment the centralized power of the Crown by acting as a public prosecutor. Gradually, the grand jury developed independence of action from the Crown. This was accomplished by enclosing its proceedings in a veil of secrecy, which insulated the jurors from the pressures of the Crown and permitted it to guard the people against the oppressive power of autocratic government.

Grand jury proceedings have been closed to the public since the 17th century, and records of such proceedings have been kept from the public eye. See *Calkins, Grand Jury Secrecy,* 63 Mich.L.Rev. 455, 457 (1965). The rule of grand jury secrecy was imported into our federal common law and is an integral part of our criminal justice system. See *Costello v. United States,* 350 U.S. 359, 362, 76 S.Ct. 406, 408, 100 L.Ed. 397 (1956).

In *United States v. Proctor & Gamble, Co.,* 356 U.S. 677, 681-682, n. 6, 78 S.Ct. 983, 986 n. 6, 2 L.Ed.2d 1077 (1958), the Supreme Court said that the reasons for grand jury secrecy were summarized correctly in *United States v. Rose,* 215 F.2d 617, 628-629 (3rd Cir.1954):

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have informa



> tion with respect to the commission of crimes; (5) to protect [the] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there is no probability of guilt.

Plaintiff argues that at present the grand jury is no longer independent from the central government and that therefore secrecy no longer serves the same purposes. "The grand jury now relies upon the prosecutor to initiate and prepare criminal cases and investigations which come before it. The governmental attorney is present while the jury hears testimony; he calls and questions the witnesses and he draws the indictment. The only remnant of secrecy with respect to the government which adheres today is the practice of conducting the actual deliberations and voting of the jury in private." *In re Russo,* 53 F.R.D. 564, 569 (1971).

## THE TENTH AMENDMENT

Florida has made a policy choice that permanent and total nondisclosure of witness testimony strengthens the grand jury system, and enhances the ability of the State to detect and eliminate organized criminal activity by improving the evidence-gathering process. In attempting to resolve the dispute, the Court considered whether the Tenth Amendment provides support for Florida's power to make this policy choice. The Tenth Amendment states that the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.

In *National League of Cites v. Usery,* 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), the Supreme Court held that

the statutory amendments of the Fair Labor Standards Act exceeded congressional power under the Commerce Clause of the Constitution (Art. I, 8, cl. 3) because they directly displaced the state's freedom to structure integral operations in areas of traditional governmental functions. In *National League*, the Court said, "Our federal system of government imposes definite limits upon the authority of the States as States by means of the commerce power" [citation omitted]. In *Frye v. United States* [citation omitted] the Court recognized that an express declaration of this limitation is found in the Tenth Amendment:

> While the Tenth Amendment has been characterized as a "truism" stating that 'all is retained which has not been surrendered' [citation omitted], it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system. 421 U.S. 542, 547, n. 7, 44 L.Ed.2d 363, 95 S.Ct. 1792 [1795 n. 7].

In *National League*, Congress through its legislation sought forced relinquishment of important government activities; the amendments displaced state policies regarding the manner in which they will structure the delivery of those governmental services which their citizens require. The Court therein said this was an impermissible interference.

After *National League*, the Supreme Court declined to invalidate a single federal law applicable to the States on the ground that it interferes with their autonomy under the Tenth Amendment. With the Supreme Court's decision in *Garcia v. San Antonio Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), which overruled *National League*, the Tenth Amendment has become a "dead



letter" in constitutional law. *State of Mich. v. Meese*, 666 F.Supp. 974, 977 (E.D.Mich. 1987).

"Subsequent to *Garcia, supra*, it is not clear what standard applies to issues like the one before the Court. *Garcia* seems to have discarded Usery's 'balancing' test. [Citation omitted]. However, *Garcia* fails to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause." *State of Mich. v. Meese, supra.* Tenth Amendment analysis has not offered the Court any guidance in resolving the dispute now before it.

## THE GRAND JURY IN FLORIDA

The plaintiff has brought before the Court a case of first impression. Plaintiff wishes to write and speak about the matters which were under investigation by the Charlotte County Special Grand Jury, including the grand jury proceeding itself. He challenges a Florida Statute regulating the judicial proceeding, arguing that it is constitutionally overbroad, and it infringes on Plaintiff's First Amendment rights without serving a compelling governmental interest in the least restrictive manner.

Defendant contends that Plaintiff is seeking not only a constitutional right to publish his testimony, but also to publish anything connected with his testimony and evidence coming to his personal knowledge while before the grand jury, such as questions posed, statements made by grand jurors, discussions between grand jurors and the prosecuting attorney, between the prosecuting attorney and the witness, and anything that took place in the grand jury room relating to testimony and evidence observed or heard by plaintiff.

The Court notes that the Supreme Court has made it clear that the proper function of the grand jury system depends upon the secrecy of the grand jury proceedings. *Douglas Oil co. v. Petrol Stops,* 441 U.S. 211, 99 S.Ct. 1667, 60 L.Ed.2d 156 (1979). The policy of secrecy must not be broken except where there is a compelling necessity. *United States v. Proctor & Gamble Co.,* 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958). The Supreme Court has permitted intrusions on other constitutional rights in connection with grand jury proceedings. *United States v. Calandra,* 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974); *Branzburg v. Hayes,* 408 U.S. 655, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972).

[4] Plaintiff has argued that since one traditional reason for grand jury secrecy, independence from the government, has abated, Florida's non-disclosure statute is no longer justified. This Court finds that Florida has articulated a compelling need for continued secrecy in the stated intent of the statute. In addition to strengthening the grand jury system itself, the statute is designed to enhance Florida's ability to detect and eliminate organized criminal activity by improving the evidence-gathering process. On deposition, witnesses for Defendant have described the policies behind Florida's statute. These reasons include the juror's fear that their identities may somehow be disclosed, with resulting retaliation; impairment of a present investigation because witnesses are coached; and impairment of future investigations because the nature of the investigation is broadcast to future witnesses. There is also testimony that the media has greater access to the state courthouse in that the media may be present in the hall outside the grand jury room, unlike the federal courthouse, inside which cameras are not allowed.

In *Branzburg v. Hayes,* 408 U.S. 665, 92 S.Ct. 2646, 33 L.Ed.2d 626 (1972), the Supreme Court declined to grant



newsmen a testimonial privilege, finding the investigation of crime by the grand jury implements the fundamental governmental role of securing the safety of one person and property of citizens. The Court found the subpoena power of the grand jury to be essential to its task, and noted that the grand jury plays an important, constitutionally mandated role in fair and effective law enforcement.

Plaintiff has suggested that Florida could fashion a statute applying only to "problem" cases that would overcome any conflict with First Amendment rights. The Court believes this presents severe practical and conceptual difficulties. Almost any case could develop into a "problem" case at any time during the investigation. The Court wonders at what point it could rest assured that all relevant information had been gathered so that the competing interests could be fairly balanced. It is not hard to draw a line around the "easy" case but developing a reliable standard to define cases falling outside that line is fraught with problems, and the consequences of error are extreme.

As the Court stated in *Branzburg*:

> At the federal level, Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned, and, equally important, to refashion those rules as experience from time to time may dictate. There is also merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas. It goes without saying, of course, that we are powerless to bar state courts from responding in their own way

> and construing their own constitutions so as to recognize a newsman's privilege, either qualified or absolute. *Branzburg,* 408 U.S. at 706, 92 S.Ct. at 2669, 33 L.Ed.2d at 654.

Plaintiff has suggested that Florida draw instruction from the federal experience with witness disclosure. Rule 6(e) of the Federal Rules of Criminal Procedure allows disclosure of witness testimony, and federal courts have concluded that there is no evidence that this breach of secrecy has diminished the effectiveness of the grand jury system or adversely affected the ability of the government to investigate crime and bring offenders to justice. *See, In re Russo,* 53 F.R.D. 564, 570 (D.C. Cal. 1971). The Court notes that the federal rule allowing disclosure of witness testimony is a rule of procedure. Prior to adoption of the rule, the leading case on grand jury secrecy was *Goodman v. United States,* 108 F.2d 516 (9th Cir.1939), wherein two witnesses were adjudged in contempt of court for refusing to take an oath of secrecy. The witnesses contended such an oath would violate constitutional guarantees of freedom of speech, among other rights. The *Goodman* court said:

> The contention that the oath violates the right of the witness to freedom of speech is specious. The right is not absolute . . . It has never been supposed that grand jurors are deprived of the constitutional right of free speech through an oath of secrecy which they take; and a witness summoned to appear before them is in no better case. Through their participation witnesses occupy a special relationship to the state; for reasons grounded in public policy, as we have seen, the testimony taken in these proceedings is privileged and confidential. Considerations of mere convenience or even downright hardship on the part of the witness do not outweigh the secrecy in respect of grand jury investigations. 108 F.2d at 520.



Prior to the adoption of Rule 6(e), most federal courts required an oath of secrecy of grand jury witnesses. This practice was upheld as "within the discretionary power of the court . . . if the court believes the precaution necessary in the investigation of crime." *Goodman,* 108 F.2d at 520. The adoption of Rule 6(e) was not predicated on First Amendment considerations, but on the idea of fairness. The Advisory Committee Notes state "The seal of secrecy seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate." See *Note 2 of Advisory Committee Notes to Fed.R.Crim.P. 6(e).* The Florida legislature has made a different choice; it has decided that witness non-disclosure is necessary to preserve the integrity of the grand jury and to effectively fight organized crime. This Court believes that it is equally within the discretion of the legislature to do so. Because the federal judiciary opted to change its policy does not mean that the previous policy violated the Constitution.

There is no question that the First Amendment functions as a check on legislative power. Important as they are, First Amendment rights are not the only issue in this dispute. What is at stake is where the authority to control the judicial process lies. Plaintiff is requesting that this Court move control of the proceedings from the exclusive control of the judge and pass part of that control to the individual witness. With the rule of witness non-disclosure in place, the judge can be reasonably certain that each juror has received the same information. To allow witness disclosure removes that certainty.

Plaintiff has argued that grand jurors are fulfilling an obligation by participating in the investigatory process, and jurors willingly take an oath of secrecy, whereas the witness

who is subpoenaed appears as an involuntary participant. This Court is well aware of the awesome responsibility that falls on the grand juror. The Court does not perceive any difference in status between witnesses and other participants in the judicial process on the basis of willingness to participate. Each participant is called to perform a different function, willing or not. Plaintiffs contend that other participants willingly divest themselves of their First Amendment rights in order to fulfill obligations of employment, but since a witness is compelled to appear, he should retain the right to speak or remain silent, as he chooses. But jurors are citizens, too. The Florida legislature has adopted a policy which would protect the safety of its citizens who serve on the grand jury. The Court believes that the legislature has the power and the duty to impose the rules it deems necessary to ensure the integrity of the truth-finding process and, specifically, to guard the safety of the jurors themselves. The Court notes that under the present statute, a Court may permit disclosure of grand jury testimony for three reasons: a) To ascertain whether it is consistent with testimony given by the witness before the Court, b) to determine whether the witness is guilty of perjury, and c) to further justice. It appears that there is a statutory procedure in place which would allow a further balancing of interests to take place.

Plaintiff has argued that participation as a witness in grand jury proceedings creates a stigma that is impossible to dispel without the right to speak out to describe that participation. The grand jury system has functioned in secrecy for hundreds of years. It plays an important role in fair and effective law enforcement. This Court does not lightly dismiss damage to an individual's personal relationships. Prior to the adoption of Rule 6(e), federal courts accepted these hardships as a necessary evil, the price of a functioning system of criminal justice. The Florida legislature continues to accept these hardships for the same rea-



son. In considering the criminal justice system as a whole, the Court concludes that often, stigma continues to attach to accused criminals who have been acquitted and who have the right to speak about their trials. When a witness participates in grand jury proceedings, the reasonable conclusion is that the person knows something relevant, nothing more or less. It is beyond the concern of this Court to attempt to control the public imagination. Further, the Florida Supreme Court has held constitutional Section 905.28(1), permitting repression of certain statements in a grand jury presentment about a person against whom no charges had been voted. *Miami Herald Publishing Co. v. Marko*, 352 So.2d 518 (Fla.1977). That court said:

> In considering whether statements in a 'no indictment' grand jury report can be repressed on the ground that public officials may be exposed to criticism, scorn, or recommendations unfavorable to their reputation, it is essential to bear in mind the context in which the issue arises. Unlike the opportunity for refutation which is available when adverse character or reputational matters are disclosed during the course of a public trial, there is no comparable opportunity to challenge grand jury report disclosures contemporaneously with their publication. These matters emerge from a grand jury process which has operated in secrecy, under the guidance of a prosecutor and the supervision of a judge to be sure, but where there has been no right to challenge witnesses or to be represented by counsel. It is possible, then, that the testimony and information presented to a grand jury, on which they must rely and report, is potentially one-sided and inaccurate. Thus, while one charged with the commission of a crime as a result of this process has a full opportunity for public clarification of misleading data and personal vin-

> dication through a public trial, no comparable means of vindication exists for one whose character is impugned in a report unaccompanied by an indictment. It is undoubtedly for this reason that the legislature has now afforded an opportunity to prevent the publication of unfavorable material through the repression of matter that is 'improper and unlawful.' 352 So.2d at 520-521.

The Florida Supreme Court has expressed its concern for the reputation of the innocent accused. The Court does not believe that the reputation of a witness should be more protected than the reputation of the target of a grand jury investigation.

The Supreme Court in *Landmark Communications v. Commonwealth of Virginia*, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978), reversed a newspaper's conviction for publication of an article which accurately reported on pending inquiry by the Virginia Judicial Inquiry and Review Commission. That case addressed the narrow issue of whether the First Amendment permits the criminal punishment of third persons who are strangers to the inquiry, including the news media, for publishing truthful information regarding confidential proceedings before the Commission.

*Landmark Communications* did not consider a constitutional challenge to a State's power to keep the proceedings confidential or to punish participants for a breach of that mandate. This is the issue that now confronts this Court. Plaintiff is asking this Court to open the door to proceedings which have traditionally remained shrouded in secrecy. This is not a trial proceeding, to which there is a constitutional right of access. Nor is there evidence that the grand jury proceeding was conducted in bad faith to deliberately silence a witness, to which a First Amendment challenge



would be viable. *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). There is no priority in the Bill of Rights that allows this Court to unerringly determine whose rights take precedence in this dispute. The Court is required to choose among competing policies.

Plaintiff has argued that permanent and total witness non-disclosure is not necessary. He contends that the federal experience under Rule 6(e) has shown that the system continues to work even with witness disclosure, and that, therefore, the State cannot meet its burden of justifying an infringement on First Amendment rights furthering a compelling state interest using the least restrictive means. Defendants respond that the legislature has determined that permanent and total non-disclosure is necessary to enhance the integrity of the grand jury system and to effectively fight organized crime in Florida. Defendants contend that the legislature has already balanced the competing interests in choosing its policy of non-disclosure.

The Court believes that independence of mind is as important for the grand jurors as for the witnesses in the truth-gathering process, if not more so. Permanent, total confidentiality allows the necessary independence of mind required for the effective functioning of the grand jury. It allows the juror to be as certain as he possibly can be that his identity will not be revealed, subjecting him to retaliation. This frees the juror to ask searching questions. It produces reliable results because the flow of information into the minds of the jurors is controlled. Each juror receives the same information. There is no media attention during proceedings to possibly distort the jurors' attitudes. There is no opportunity for one witness to coach a later witness.

This Court does not believe that quantitative analysis of the number of indictments obtained answers the question of how much integrity in the grand jury system is enough.

The Florida legislature has opted for the maximum possible. The court believes that it is absolutely within the discretion of the legislature that it make that quantitative analysis of its judicial process. In Florida, jurors are reminded that their "searching eye[s] and . . . inquiring mind[s] are an effective deterrent to evil and corruption" and "no officer or agency of the government is above or beyond the reach of the grand jury." One major purpose of the First Amendment is scrutiny of the government. The Court believes that the individual's right to speak is subsumed into the grand jury's broad investigatory powers. Being called as a witness allows the witness to "do" instead of "talk."

The Court believes that this is the exceptional case where a severe infringement on rights under the First Amendment is permissible.

Accordingly, it is

ORDERED that plaintiff's motion for preliminary injunction is denied. It is further

ORDERED that defendants' motion for summary judgment is granted.



**United States District Court**
**Middle District of Florida**
**Ft. Myers Division**

MICHAEL SMITH,

*Plaintiff,*

vs.

Case No. 87-143-Civ-FTM-17-B

ROBERT A. BUTTERWORTH, JR.,
Attorney General of the State of Florida, and

T. EDWARD AUSTIN, JR., as
State Attorney assigned to
the Charlotte County Special Grand Jury,

*Defendants.*

---

**VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

---

Plaintiff Michael Smith sues Robert A. Butterworth, Jr. as the Attorney General of the State of Florida, and T. Edward Austin, Jr., as State Attorney assigned by Governor Bob Graham to the Charlotte County Special Grand Jury, and alleges:

1. This is an action for declaratory and injunctive relief to enforce rights guaranteed under the First Amendment to the United States Constitution.

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§1343(3) and 1343(4), authorizing jurisdiction of claims brought under 42 U.S.C. §1983 to enforce rights guaranteed by the United States Constitution, and under 28 U.S.C. §1331.

3. This Court is authorized to issue a declaratory judgment and injunctive relief pursuant to 28 U.S.C. §§2201 and 2202, 42 U.S.C. §1983 and Rule 65(a), Federal Rules of Civil Procedure.

**The Parties**

4. Michael Smith ("Smith") is a citizen of the United States and of the State of Florida, residing in the City of Punta Gorda. Smith is a professional writer and has been employed since 1984 by Punta Gorda Herald, Inc., publisher of the *Charlotte Herald-News*, a newspaper distributed in Charlotte County, Florida. Smith was subpoenaed and did testify before the Charlotte County Special Grand Jury on March 27, 1986. A copy of his subpoena is attached as Exhibit A.

5. Robert A. Butterworth, Jr., ("Butterworth") is the Attorney General of the State of Florida. In that capacity, pursuant to the color of authority conferred upon him by the laws and Constitution of the State of Florida, he is responsible for enforcing the criminal laws of Florida.

6. T. Edward Austin, Jr., ("Austin") is the State Attorney for Duval County, Florida. Upon Governor Bob Graham's assignment, pursuant to Section 27.14, Florida Statutes (1985), he served as State Attorney overseeing the Charlotte County Special Grand Jury which heard the March 27, 1986, testimony of Michael Smith.



**Background Facts**

7. Smith testified before a Charlotte County Special Grand Jury on March 27, 1986. He did not appear voluntarily, but was subpoenaed to testify by defendant Austin, who acted under color of authority conferred upon him by the laws of the State of Florida. The Special Grand Jury terminated in April, 1986.

8. During Smith's appearance before the special grand jury, members of Austin's legal staff warned Smith that revelation of his testimony would constitute a criminal violation.

9. Smith intends to report and publish a news story and potentially write a book about the matters that were under investigation by the Charlotte County Special Grand Jury, including the grand jury proceeding itself.

10. Smith is concerned that, if he publishes any of the questions addressed to him or his answers, he will be criminally prosecuted pursuant to Florida law.

**Statutory Prohibition of Disclosure of Grand Jury Testimony and Proceedings**

11. Section 905.27(1), Florida Statutes (1985)(the "Statute"], provides a blanket and permanent prohibition of disclosure of testimony by a witness examined before the grand jury and of any other evidence received by it. The prohibition applies to "[a] grand juror, state attorney, assistant state attorney, reporter, stenographer, interpreter, *or any other person*" appearing before the grand jury, thereby including by its terms a witness' disclosure of his own testimony. §905.27(1), Fla. Stat. (1985)(emphasis added).

12. Any violation of the Statute's provisions may result in contempt sanctions and criminal penalties under Sections 905.27(4) and (5), Florida Statutes (1985). Upon conviction, a violator of the Statute is guilty of a first degree misdemeanor, punishable under Section 775.03, Florida Statutes, or by fine not exceeding $5,000, or both. *Id.*

13. Disclosure is permitted only when required by a court for the purpose of:

> (a) Ascertaining whether it is consistent with the testimony given by the witness before the court;
>
> (b) Determining whether the witness is guilty of perjury; or
>
> (c) Furthering justice.

§§905.278(1)(a), (b), (c), Fla. Stat. (1985).

**CLAIM FOR RELIEF**

14. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 12, above, as if set forth in full.

15. This proceeding for declaratory judgment, pursuant to 28 U.S.C. §§2201 and 2202 and 42 U.S.C. §1983, is for the purpose of determining the following issue and actual controversy between the parties:

> Whether enforcement of Section 905.27, Florida Statutes (1985) against Smith for his written or oral publication of his experience and testimony before the Special Grand Jury is violative of the



> First Amendment to the United States Constitution under color of state law.

16. Defendant Butterworth, acting under color of authority conferred upon him by the laws of the State of Florida, is obligated to enforce the criminal laws of the State.

17. Defendant Austin, acting under color of authority conferred upon him as state attorney assigned to the Charlotte County Special Grand Jury, has the duty to inform the Attorney General of any violation of the statute regulating the procedures of that grand jury.

18. Plaintiff Smith has the desire to exercise his First Amendment right to freedom of speech by relating publicly his experience and testimony before the grand jury. Smith is aware of the criminal provisions of the Statute, and is therefore unconstitutionally chilled from exercising his right to speak by the defendants, based upon the color of authority conferred upon defendants by the constitution and laws of the State of Florida to enforce the Statute against him.

19. This action is brought by Smith to have his rights and the constitutionality of the Statute's prohibition on his speech clarified by this Court. Pursuant to that declaration, Smith also seeks to enjoin the defendants from enforcing the Statute because such enforcement would deprive him under color of law of his rights under the First Amendment to the United States Constitution.

20. The Statute's blanket prohibition of grand jury witnesses' disclosure of their own testimony violates the First Amendment to the United States Constitution for the following reasons:

(a) it indiscriminately and permanently imposes under color of state law a direct burden upon the exercise of witnesses' fundamental right of free speech, while failing to serve any compelling state interest;

(b) the goals traditionally deemed to justify secrecy in grand jury proceedings do not require for their preservation the blanket and permanent prohibition on speech imposed therein. Such goals could be accomplished through means that are less restrictive on constitutional freedoms;

(c) it provides criminal penalties for all forms of disclosure, making it a crime to utter the truth. These penalties chill the right to speak, causing persons like Smith who would otherwise exercise that right to curtail or refrain from such speech.

WHEREFORE, Plaintiff Smith requests that this Court render judgment;

A. Declaring the Statute unconstitutional as an overbroad prohibition on the right to speak in violation of the First Amendment to the United States Constitution;

B. Declaring the Statute unconstitutional as a blanket and permanent prohibition on the exercise of the First Amendment right to speak without requiring demonstration that the prohibition is narrowly tailored to serve a specific, overriding state interest on a case-by-case basis;

C. Enjoining the Defendants from attempting to enforce the penalties under the Statute against Michael Smith;

D. Awarding Plaintiff costs and attorneys' fees pursuant to 42 U.S.C. 1988, and such additional relief as this Court deems appropriate.



HOLLAND & KNIGHT

/s/
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Post Office box 1288
Tampa, Florida 33601
(813) 223-1621

Attorneys for Plaintiff

**VERIFICATION OF COMPLAINT**

STATE OF FLORIDA

COUNTY OF CHARLOTTE

I, Michael Smith, being first duly sworn, deposes and says he has read the foregoing Verified Complaint for Declaratory and Injunctive Relief and knows the contents thereof and that the same is true and correct to the best of my personal knowledge.

/s/
MICHAEL SMITH

SWORN TO AND SUBSCRIBED BEFORE ME THIS 18TH DAY OF NOVEMBER, 1987.

/s/
Jeanette A. Culpepper
Notary Public

Notary Public State of Florida
My Commission Exp. Feb. 14, 1988
*Bonded thru General Ins. Und.*
MY COMMISSION EXPIRES:

**United States District Court**
**Middle District of Florida**
**Fort Myers Division**

MICHAEL SMITH,

*Plaintiff,*

vs.

Case No. 87-143-Civ-FTM-17-B

ROBERT A. BUTTERWORTH, JR.,
Attorney General of the State of Florida, and
T. EDWARD AUSTIN, JR., as
State Attorney assigned to the
Charlotte County Special Grand Jury,

*Defendants.*

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**DEFENDANTS' MOTION TO DISMISS OR MOTION FOR SUMMARY JUDGMENT**

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Defendants, by and through undersigned counsel, move this court pursuant to Fed.R.Civ.P. 12(b)(6) to dismiss this cause for failure to state a claim upon which relief may be granted. In the alternative, defendants move this court pursuant to Fed.R.Civ.P. 56 to enter summary judgment in their favor as there is no genuine issue of material fact in dispute and defendants are entitled to judgment as a matter of law.

Pursuant to Local Rule 3.01(a), Middle District, a memorandum of law follows.



**MEMORANDUM OF LAW**

For the purpose of this motion, defendants do not dispute the background facts as represented by plaintiff in his verified complaint for declaratory and injunctive relief. However, it is noted that the complaint fails to establish that either defendant is a proper party. There is no allegation that defendant Butterworth possesses requisite statutory authority to enforce or prosecute violations of Section 905.27, Florida Statutes; similarly, there is no allegation that defendant Austin possesses requisite authority to prosecute violations of Section 905.27, Florida Statutes, in Charlotte County, Florida, which is in Florida's Twentieth Judicial Circuit. Defendant Austin is not the state attorney for that judicial circuit, and there is no allegation that defendant Austin's authority under gubernatorial assignment includes such prosecutions.

By his verified complaint, plaintiff seeks a declaration that Section 905.27, Florida Statutes, is violative of the First Amendment to the United States Constitution. In his memorandum of law supporting his motion for preliminary injunction, however, plaintiff represents that his challenge is directed only to the words "any other person" contained in Section 905.27(1), Florida Statutes, which plaintiff presumes includes grand jury witnesses such as plaintiff.

Plaintiff frames the issue in terms of his professed desire

> to report and publish a news story and potentially write a book about *the matters that were under investigation by the Charlotte County Special Grand Jury, including the grand jury proceeding itself.* Smith is concerned that, if he publishes any of the questions addressed to him or his answers, he will be criminally prosecuted pursuant to Florida law.

Paragraphs 9 an 10 of verified complaint.

The above-quoted portion demonstrates that plaintiff's desire goes beyond merely reporting and publishing the questions addressed to him by the grand jury panel and his answers to those questions. Under plaintiff's First Amendment claim, he admittedly seeks to publish regarding all matters under investigation by the grand jury, including the proceedings themselves.

Plaintiff's framing of the issue ignores its obvious threshold logical consequences, for the declaration he seeks would apply to any grand jury witness who wishes to publish accounts of his or her testimony, any person who (for whatever legitimate reason) is permitted to accompany a witness to appear before a grand jury and wishes to publish accounts of testimony that person hears, and any witness or other person who views the grand jury's receipt of evidence and wishes to publish with regard to those evidentiary matters.

At the outset, plaintiff's employment as a news reporter does not elevate him to a higher news-gathering status than that enjoyed by any member of the public. As was said in *Garrett v. Estelle*, 556 F.2d 1274, 1277 (5th Cir. 1977), *cert. denied*, 438 U.S. 914, 98 S.Ct.. 3142, 57 L.Ed.2d 1159 (1978):

> News gathering is protected by the first amendment, for "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665, 681, 92 S.Ct. 2646, 2656, 33 L.Ed.2d 626 (1972). This protection is not absolute, however. As the late Chief Justice Warren wrote for the Supreme Court. *'the right to speak and publish does not carry with it the unrestrained right to gather information', Zemel v. Rusk*, 381 U.S. 1, 17, 85 S.Ct.. 1271, 1281, 14 L.Ed.2d 179 (1965). In *Branz-*



> *burg* the Court said, *'It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.' Branzburg v. Hayes, supra*, 408 U.S. at 684, 92 S.Ct. at 2658. Relying on *Branzburg* and *Zemel* the Court has recently held, 'The First and Fourteenth Amendments bar government from interfering in any way with a free press. *The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally.' Pell v. Procunier*, 417 U.S. 817, 834, 94 S.Ct.. 2800, 2810, 41 L.Ed.2d 495 (1974); *accord, Saxbe v. Washington Post Co.*, 417 U.S. 843, 850, 94 S.Ct. 2811, 2815, 41 L.Ed.2d 514 (1974). (Emphasis added)

Invoking the First Amendment in his status as a news reporter, plaintiff's claim is far more pervasive than he represents in his complaint, for he is arguing for the constitutional right to publish not only as to his testimony, but on matters connected with testimony and evidence coming to his personal knowledge while with the grand jury, such as questions posed or statements made by grand jurors, between grand jurors and the prosecuting attorney, between the prosecuting attorney and the witness, and any other interaction between and among persons in the grand jury room relating to testimony and evidence received during the proceeding and observed or heard by the person seeking to disclose.

If, in the name of the First Amendment, plaintiff — indeed, any and all grand jury witnesses — may with impunity disclose their testimony and evidence, as well as any and all observable matters in connection with their testimony and evidence, then Florida's policy choice with

regard to the primacy of grand jury secrecy and judicial supervision of grand jury proceedings will be eviscerated.

Therefore, the issue properly presented by plaintiff's verified complaint is:

> Whether a person, notwithstanding Section 905.27(1), Florida Statutes, may with impunity publish accounts of observable proceedings before the grand jury, including questions and answers and the evidence received by the panel.

Plaintiff maintains that the declaration he seeks will have no effect on the grand jury system. To the contrary, however, plaintiff's claim, if vitalized, would wreak havoc with the historical, traditional and protected role of the primacy of secrecy surrounding grand jury proceedings and judicial supervision over those proceedings.

To properly place plaintiff's claim in the context of permissible judicial review as a predicate to an analysis of the merits of his argument, defendants shall divide their arguments into three major categories: the federal experience under Rule 6(e) of the Federal Rules of Criminal Procedure; the scope of judicial review and the court's long-standing deference to and protection of the secrecy of grand jury proceedings as against challenges; and Florida's experience under Section 905.27(1), Florida Statutes.

## I
## Federal Rules of Criminal Procedure 6(e) — An Analysis of the Federal Experience

Stripped of its gloss, plaintiff is asking this Court to legislate on Section 905.27(1), Florida Statutes, by adopting the approach taken in Fed.R.Crim.P. 6(e). What plaintiff overlooks is that Rule 6(e) represents a policy choice; there



is no constitutional requirement involved in the Rule 6(e) choice to exclude grand jury witnesses from the list of those who are not permitted to make disclosures thereunder.

Even under Rule 6(e), the primacy of grand jury secrecy and judicial supervision of the grand jury remain inviolate. In *United States v. Malatesta*, 583 F.2d 748, 752 (5th Cir. 1978), the court said

> Rule 6(e) of the Federal Rules of Criminal Procedure prohibits disclosure of matters occurring before the grand jury except when it is directed by the court, is made to the attorneys for the government for use in performance of their duties, or is made to governmental personnel deemed necessary to assist an attorney for the government in performance of his duty to enforce federal criminal law. The rule is designed to implement the traditional reasons for cloaking grand jury proceedings: (1) to prevent the accused from escaping and from tampering with witnesses; (2) to protect the reputation of an accused who is not indicted; (3) to encourage witnesses to appear and speak freely; and, (4) to encourage jurors to engage in uninhibited investigation and deliberation. *See Pittsburgh Plate Glass Co. v. United States*, 1959, 360 U.S. 395, 405, 79 S.Ct.. 1237, 1244, 3 L.Ed.2d 1323, 1330 (Brennan, J., dissenting); *United States v. Proctor & Gamble Co.*, 1958, 356 U.S. 677, 681 n. 6, 78 S.Ct.. 983, 986, 2 L.Ed.2d 1077.

*See also Miami Federal Grand Jury No. 79-8*, F.Supp. 490 (S.D. Fla. 1979).

After reflecting on the policy considerations supporting the federal rule, the court admonished that "(j)udicial excep-

tions to the broad sweep of Rule 6 should not be expanded." *Id.* at 753.

In *In re Grand Jury Witness Subpoena*, 370 F.Supp., 1282, 1285 (S.D. Fla. 1974), the court, in footnote 5, reflected on the policy choice involved in Rule 6(e) as follows:

> Of course, under Fed.R.Crim.P. 6(e) as adopted in 1946, no obligation of secrecy is imposed on witnesses. (Citation omitted) Generally speaking, a witness may not be placed under an oath of secrecy. (Citations omitted) *Circumstances may exist, however, which would justify some restrictions on disclosure by witnesses.* (Citations omitted; emphasis added)

Therefore, even under Rule 6(e) and as against plaintiff's claim of a First Amendment right of absolute disclosure, the primacy of secrecy and judicial oversight prevail — even as to witnesses' desire to disclose their own testimony before a grand jury. On the primacy of secrecy, *see Smith v. United States*, 423 U.S. 2, 96 S.Ct.. 2, 46 L.Ed.2d 9 (1975 per Douglas, J.).

It is the primacy of secrecy which precludes a witness from entitlement of a transcript of his testimony. *See Application of Executive Securities Corp.*, 702 F.2d 406 (2d Cir. 1983), *cert. denied* 464 U.S. 818, 104 S.Ct.. 78, 78 L.Ed.2d 89.

In *In re Swearingen Aviation Corporation*, 486 F.Supp. 9, 10-11 (D.C. Mo. 1979), the court emphasized the primacy of secrecy surrounding grand jury proceedings and the necessity for judicial control and supervision of grand jury proceedings:

> The language of Rule 6(e) appears on its face to be absolute and to prevent the issuance of any type of order imposing an obligation of secrecy on a



witness. Before Rule 6(e) was enacted, the practice of most federal courts was to require grand jury witnesses to take oaths of secrecy. *Goodman v. United States*, 108 F.2d 516, 518 (9th Cir. 1939); *United States v. Central Supply Association*, 34 F.Supp. 241, 245 n. 2 (N.D. Ohio 1940). This practice was upheld as 'within the discretionary power of the court ... if the court believes the precaution necessary in the investigation of crime.' *Goodman*, 108 F.2d at 520; *see Central Supply Association* 34 F.Supp. at 245. The language of Rule 6(e) preventing the imposition of an obligation of secrecy upon grand jury witnesses is apparently aimed at eliminating this practice. The Advisory Committee Notes concerning this provision state that:

> The rule does not impose any obligation of secrecy on witnesses. The existing practice on this point varies among the districts. The seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate.

*See* Note 2 of the Advisory Committee Notes to Fed.R.Crim.P. 6(e).

> *However other courts have recognized that there are circumstances in which some restriction on disclosures by grand jury witnesses may be appropriate despite the language of rule 6(e). In re Grand Jury Summoned October 12, 1970*, 321 F.Supp. 238, 240 (N.D. Ohio 1970); *King v. Jones*, 319 F.Supp. 653, 657, 659 (N.D. Ohio 1970), *rev'd on other*

*grounds*, 450 F.2d 478 (6th Cir. 1971), *vacated as moot*, 405 U.S. 911, 92 S.Ct. 956, 30 L.Ed.2d 780 (1972); *In re Grand Jury Witness subpoenas*, 370 F.Supp., 1282, 1285 n. 5 (S.D. Fla. 1974). *The court does not believe that this provision was intended to prevent the imposition of an obligation of secrecy upon grand jury witnesses where necessary to protect the legitimate investigative function of the grand jury. To hold otherwise would render a court powerless to preserve the integrity of the judicial process.* The grand jury is an arm of the district court through which it derives its power, *In re Long Visitor*, 523 F.2d 443, 446-47 (8th Cir., 1975); and the grand jury exercises its powers under the authority and supervision of the court. *In re Gopman*, 531 F.2d 262, 266 (5th Cir. 1976). *Thus the court has the power and the duty to maintain the integrity of the investigative processes of the grand jury, and Rule 6(c) should not be read to command inaction when the circumstances require that it act.* (Emphasis added.)

Although on appeal, the court granted certain disclosure, that decision was based on principles of fairness under Rule 6(e) and not on any First Amendment claim. *See* 605 F.2d 125, 127 (4th Cir. 1979).

This case demonstrates that even under Rule 6(e), the primacy of grand jury secrecy and judicial supervision over grand jury proceedings remain viable — and includes court-supervised restrictions on disclosure by grand jury witnesses.



In *In re Grand Jury Investigation*, 610 F.2d 202, 217-218 (5th Cir. 1980), the issue involved media reports of grand jury proceedings and whether these reports violated Rule 6(3). The court said

> The information revealed in the news article must be considered in determining whether a Rule 6(e) source is identified. For example, if an article reports that following the presentation of specified evidence at a future time, the grand jury plans to return an indictment against named persons, the attribution of such information to 'sources close to the investigation' might, without more, suffice to establish a prima facie case of a rule 6(e) violation by the attorneys conducting the investigation.

As demonstrated by this case, there is no First Amendment claim by the media — or anyone else — that their rights to publish transcend the impact of the rule and the primacy of grand jury secrecy subject to judicial supervision.

As noted earlier, the issue of witness exclusion from Rule 6(e) is a policy choice; Florida has opted for a different policy choice — that of including witnesses from revealing testimony or any other matter embraced by Section 905.27(1), Florida Statutes. This policy choice is consistent with well-established law to the effect that secrecy as to proceedings before a grand jury extends not only to the grand jurors and, for the purpose of the subject Florida statute, a state attorney, assistant state attorney, reporter, stenographer, and interpreter but to those who appear exclusively as witnesses before a grand jury. *See 38 C.J.S. Grand Juries*, Section 43.

The requirement that a witness before a grand jury take an oath of secrecy does not violate the right of that witness to freedom of speech, which is not an absolute right. *Good-*

*man v. United States*, 108 F.2d 516 (9th Cir. 1939). In *Goodman*, the court at 108 F.2d 519-520 said the following:

> The practice of requiring witnesses to take an oath of secrecy is a logical method of effecting the general policy of secrecy in respect of the proceedings of these bodies. In the broad sense grand jurors themselves are witnesses; for a grand jury may act upon knowledge required either from their own observations or from the evidence of witnesses given before them. (Citation omitted)
>
> * * *
>
> If witnesses are free to broadcast their testimony after leaving the grand jury room, or if they may, under pressure, disclose it to those under investigation or to their attorneys, grand jury proceedings would in large measure be shorn of their traditional privacy.
>
> * * *
>
> It would seem to be well within the discretionary power of the court to impose an oath of secrecy not alone upon grand jurors, but upon the witnesses, if the court believes the precaution necessary in the investigation of crime. More particularly is this true where the grand jury has itself requested the imposition of the oath on the witnesses; for these semi-autonomous bodies are entitled to have the privacy of their investigations insured by all reasonable means.
>
> The contention that the oath violates the right of the witness to freedom of speech is specious. The right is not absolute. (Citations omitted) It has never been supposed that grand jurors are deprived of the constitutional right of free speech through the oath of secrecy which they take; and a witness summoned to appear before them is in



> no better case. Through the participation in the proceedings both grand jurors and witnesses occupy a special relationship to the state; and for reasons grounded in public policy, as we have seen, the testimony taken in these proceedings is privileged and confidential. Considerations of mere convenience or even of downright hardship on the part of the witness do not outweigh the policy of secrecy in respective grand jury investigations.

Even though the above-quoted language precedes the promulgation of Rule 6(e), the overriding considerations of primacy of secrecy accorded grand jury proceedings and judicial supervision are not vitiated by the enactment of the federal rule — indeed, they are vitalized. Moreover, and more to the point here, the federal rule's exclusion as to witnesses is in no way grounded on First Amendment considerations; rather, the choice is one of policy.

Plaintiff places profound reliance on the singular fact that the Charlotte County Special Grand Jury completed its work, thereby vitiating any remaining claim of the primacy of grand jury secrecy. In *United States v. Sobotka*, 623 F.2d 764, 767 (2d Cir. 1980), the court, again addressing the federal rule, rejected the argument that once the grand jury has completed its deliberations, the policies underlying the need for secrecy are no longer present. The federal appeals court, in discussing this issue, said:

> As the Supreme Court has noted, the showing of some necessity must be made even when the grand jury has concluded its investigation. For in considering the effects of disclosure on grand jury proceedings, the courts must consider not only the immediate effects upon a particular grand jury, *but also the possible effect upon the functioning of future grand juries. Persons called upon to testify*

> *will consider the likelihood that their testimony may one day be disclosed to outside parties.* Fear of future retribution or social stigma may act as powerful deterrents to those who would come forward and aid the grand jury in the performance of his duties . . . thus, the interests in grand jury secrecy, although reduced, are not eliminated merely because the grand jury has ended its activities. *Douglas Oil Co. v. Petrol Stops Northwest, supra,* 441 U.S. at 222, 99 S.Ct.. at 1674. (Emphasis added)

Whatever the merits of Rule 6(e) may be, they do not under a First Amendment claim serve as a basis for judicial repeal of language selected by the Florida legislature as its policy regarding Florida grand jury proceedings.

Defendant has reviewed the 19 cases cited by plaintiff in support of his First Amendment right to publish observable grand jury proceedings with impunity. Of these, 16 do not involve any claim, discussion or analysis of the application or implication of the First Amendment with regard to grand jury proceedings. The remaining three cases afford plaintiff no solace in his attempt to open up grand jury proceedings in the name of the First Amendment.

*In re Grand Jury Proceedings,* 558 F.Supp. 532 (W.D. Va. 1983), involves First Amendment considerations as to a United States Attorney's effort, consistent with Rule 6(e), to prevent a law firm from debriefing grand jury witnesses during the course of an ongoing tax fraud investigation. Nowhere in this case is there any consideration of a witness' attempt to accomplish in the name of the First Amendment what the plaintiff seeks to accomplish here. In fact, the court discusses at great length the adoption of a local rule to address the concern of attorney contact with grand jury



witnesses, thereby intimating that such a rule would pass constitutional muster. As the court said:

> A rule restricting the rights of all attorneys to contract and interview willing witnesses would require fundamental policy decisions of a kind not amenable to consideration by this court. Congressional action or, at the very least, a uniform rule promulgated by the Supreme Court (which is counseled by an advisory committee) is required.

558 F.Supp. at 536.

Even under the ambit of Rule 6(e), it appears such a rule of the Supreme Court would survive a First Amendment challenge. The point of this brief analysis, however, is to demonstrate the absence of any vitality to plaintiff's First Amendment claim that the rule's omission with regard to witnesses is embedded in First Amendment considerations.

*Worrell Newspapers of Indiana, Inc. v. Westhafer,* 739 F.2d 1219 (7th Cir. 1984), concerns the authority of the state to subject to criminal punishment any person who truthfully publishes the name of an individual against whom a sealed criminal indictment or information has been filed. The indictment or information did not arise from any grand jury proceeding; rather, the criminal information was filed by the county prosecutor in connection with an arson investigation. The specific information was obtained by a news reporter from a confidential source. Ind. Code Ann. Section 35-34-1-1(d) provides that, if a court sealed an indictment or information, no person would be authorized to disclose the fact of the indictment's or information's existence until the named accused was arrested or otherwise brought within the custody of the court. A violation of this law was punishable as contempt. The court held that this statute

was overbroad and that the state could have utilized less restrictive means to achieve its purpose.

What is important here is the prohibition on information obtained as the result of a prosecutor's actions, which information was obtained from another source. Nothing in the *Worrell* case even intimates plaintiff's proposition that he may publish observable grand jury proceedings as he sees fit with impunity.

In *Beacon Journal Publishing Company v. Unger,* 532 F.Supp. 55 (N.D. Ohio E.D. 1982), the court held that the requirement imposed on witnesses appearing before a county grand jury to subscribe to an oath requiring them to swear or affirm that they will not reveal to anyone the substance of their testimony was prohibited by operation of state law which, in Ohio, is identical in relevant parts to Rule 6(e). In short, this case was decided on controlling state law grounds; the court specifically determining that the oath administered to witnesses appearing before the county grand jury was invalid as being in violation of the Ohio state criminal rule which is identical to the federal criminal rule 6(e). The court intimated that any constitutional challenge would have been predicated on entitlements accorded witnesses under the above-referenced state rule. The point to be gleaned here is that this case does not afford plaintiff any solace in his attempt to employ the First Amendment for the purposes of engaging in legislative modification.

The Rule 6(e) experience as reflected by the courts requires rejection of plaintiff's First Amendment claim of absolute entitlement to publish; and to the extent the First Amendment is implicated in this cause, it is to be weighed against the powerful overriding considerations of secrecy of, and judicial supervision over, grand jury proceedings.



## II
## Scope of Judicial Review of A Statute Challenged as Unconstitutional

### a.
### Power of The Courts

There can be no question that all statutes enacted by the Florida legislature are subject to both the United States and Florida Constitutions. *Gray v. Moss,* 115 Fla. 701, 156 So. 262 (1934). Florida courts of competent jurisdiction have the power to adjudicate inoperative, either in whole or in part, those statutes that are in violation of the Federal or State Constitution. *State ex rel. Atty. Gen. v. Avon Park,* 108 Fla. 641, 149 So. 409 (1933). Not only do the courts have the power to strike down an improper statute, but also they have the "duty" to so act where there is conflict with the organic law of the state. *Delmonico v. State,* 155 So.2d 368 (Fla. 1963); *State ex rel. Davis v. Largo,* 110 Fla. 21, 149 So. 420 (1933). This includes the power to determine whether the exercise of the police power is within constitutional limits. *Liquor Store, Inc. v. Continental Distilling Corp.,* 40 So.2d 371 (Fla. 1949).

The power to declare a law unconstitutional exists *only* when it is necessary to enforce or protect some constitutional right. *State ex rel. Crim v. Juvenal,* 118 Fla. 487, 159 So. 663 (1935). The Constitution itself must be found to be violated; some other reason such as "to do justice in a dispute between the parties" is not adequate. The declaration that an act is invalid must result in giving supremacy to the Constitution. *Dutton Phosphate Co. v. Priest,* 67 Fla. 370, 65 SO. 282 (1914). If the act does not violate the United States or State Constitution, it must be given effect. *Dutton, supra.*

### b.
### What Courts Cannot Do

It is the job of the judiciary to test the challenged law to see if it meets the "constitutional muster." *State v. Kaufman,* 430 So.2d 904 (Fla. 1983). However, it is also quite clear that Florida courts do not possess the power to make political decisions, question the facts presented to the legislature, question the policy of the legislature, or criticize the choice made by the legislature among various options.

The courts do not have the power to rule upon the policy or wisdom of the law. *Fraternal Order of Police, Metro. Dade County, Lodge No. 6 v. Dep't of State,* 392 So.2d 1296 (Fla. 1980); *Sanders v. Jacksonville,* 157 Fla. 240, 22 So.2d 648 (1946). Laws cannot be declared invalid simply because a court may think them unwise, unjust, unreasonable, or oppressive. *Stern v. Miller,* 348 So.2d 303 (Fla. 1977); *Ruesga v. Diaz,* 159 Fla. 236, 31 So.2d 396 (1947). The validity of a statute may not be tested by examining the motive or purpose behind the legislature's enactment; thus, a court may *not* look into the motive of the legislature. *School Board of Escambia County v. State,* 353 So.2d 834 (Fla. 1977)("The political motivations of the legislature, if any, in enacting [the law], are not a proper matter of inquiry for this Court." 353 So.2d at 839); *Mercer v. Hemmings,* 170 So.2d 33 (Fla. 1964); *Volusia County Kennel Club, Inc. v. Haggard,* 73 So.2d 884 (Fla. 1954), *cert. denied* 348 U.S. 865 (1954).

Any questions as to the need or appropriateness of a particular enactment are for the legislature. *Stern v. Miller, supra.; State v. Bales,* 343 So.2d 9 (Fla. 1977); *State v. Perkins,* 436 So.2d 150 (Fla. 2nd DCA 1983). Furthermore, courts are without power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications. *Holly v. Auld,* 450 So.2d 217 (Fla. 1984).



### c.
### Determining the Constitutionality of A Statute

What is vital to remember is that the Florida Constitution is a limitation of power; and, unless the enacted legislation is clearly contrary to some express or implied prohibition within the Constitution, the courts have no power to invalidate the law. *Holley v. Adams,* 238 So.2d 401 (Fla. 1970); *Taylor v. Dorsey,* 155 Fla. 305, 19 So.2d 876 (1945); *State v. Bryan,* 50 Fla. 293, 39 So. 929 (905). This leaves a great deal of discretion in the legislature as to the subjects on which it may choose to legislate. Once an act is enacted by the legislature, it is valid until it is adjudicated by a court that is, in whole or part, in conflict with a provision of the Federal or State Constitution.

Today, it is beyond doubt that every law is presumed valid. *Bunnell v. State,* 453 So.2d 808 (Fla. 1984); *Metropolitan Dade County v. Bridge,* 402 So.2d 411 (Fla. 1981); *Griffin v. State,* 396 So.2d 692 (Fla. 1981), *State v. Lick,* 390 So.2d 52 (Fla. 1980); *Scullock v. State,* 377 So.2d 682 (Fla. 1979); *Cilento v. State,* 377 So.2d 663 (Fla. 1979); and *Husk v. State,* 453 So.2d 153 (Fla. 1st DCA 1984). To be defective, the law must be clearly erroneous, arbitrary, and wholly unwarranted. *State v. State Bd. of Education of Florida,* 476 So.2d 294 (Fla. 1985). In determining the validity of a statute, if possible, the courts must give it a construction that will uphold the act. *Miami Dolphins, Ltd. v. Metropolitan Dade County,* 394 So.2d 981 (Fla. 1981); *State v. Keaton,* 371 So.2d 86 (Fla. 1979); *State v. J.H.B.,* 415 So.2d 814 (Fla. 1st DCA 1982). A liberal interpretation of every statute should be given, *Taylor v. Dorsey, supra*; and, if any doubt exists about the validity of the act, all doubt will be resolved in favor of the constitutionality of the statute, *Falco v. State,* 407 So.2d 203 (Fla. 1981); *State v. Kinner,* 398 So.2d 1360 (Fla. 1980); *State v. Elder,* 382 So.2d 687 (Fla. 1980); *Fieldhouse v. Public*

*Health Trust of Dade County,* 374 So.2d 476 (Fla. 1979). If there is a reasonable interpretation that would render the statute constitutional, the courts must accept it. *Department of Insurance v. Southeast Volusia Hospital District,* 438 So.2d 815 (Fla. 1983); *State v. Lick, supra; Aldana v. Holub,* 381 So.2d 231 (Fla. 1980); *Florida State Board of Architecture v. Wasserman,* 377 So.2d 653 (Fla. 1979); *City of Clermont v. Rumph,* 450 So.2d 573 (Fla. 1st DCA 1983).

Since there is the presumption in favor of the validity of a statute, the burden of proving that a statute is unconstitutional is upon the party challenging the act. *Peoples Bank of Indian River County v. State, Dep't of Banking & Finance,* 395 So.2d 521 (Fla. 1981); *Gluesenkamp v. State,* 391 So.2d 192 (Fla. 1981), *cert. denied* 454 U.S. 818 (1981); *Fulford v. Graham,* 418 So.2d 1204 (Fla. 1st DCA 1982). The challenging party, who has the burden of proof, has to prove "beyond all reasonable doubt" that the challenged act is in conflict with some designated provision of the Constitution. *Metropolitan Dade County v. Bridges, supra; A.B.A. Industries, Inc. v. City of Pinellas Park,* 366 So.2d 761 (Fla. 1979). In particular, when the legislature makes a determination that the law has a public purpose, the party challenging the determination must show that the legislative determination was so clearly wrong that it was beyond the power of the legislature to enact. *State v. Orange County Indus. Development Authority,* 417 So.2d 959 (Fla. 1982).

When a court looks at a law to see if the facts support the law:

> if any state of fact, known or to be assumed, justifies the law, the court's power of inquiry ends; questions as to the wisdom, need or appropriateness are for the legislature.



*Fulford v. Graham,* 418 So.2d at 1205, citing *State v. Bales, supra.*

**d.**
**The Facial Constitutionality of Section 905.27, Florida Statutes**

In *Crandon v. Hazlett,* 157 Fla. 574, 26 So. 638 (1946), the Supreme Court established the controlling test for addressing a claim for facial unconstitutionality:

> [T]he vice of constitutional invalidity must inhere in the very terms of the title or body of the act. If this cannot be made to appear *from argument deduced from its terms or from matters of which the court can take judicial knowledge,* we will not go beyond the face of the act to seek grounds for holding it invalid.

26 So.2d at 643 (emphasis added), *quoting State v. Armstrong,* 127 Fla. 170, 172 So. 861, 862 (1937)(Terrell, J.). In accordance with this rule, Florida courts have consistently held that inquiries into the facial constitutionality of a statute must be restricted to the issue of whether any state of facts, *either known or assumed,* afford support for the challenged statute. *See, e.g., State v. Bales,* 343 So.2d 9, 11 (Fla. 1977); *Fulford v. Graham,* 418 So.2d 1204, 1205 (Fla. 1st DCA 1982); *Florida East Coast Ry. Co. v. United States,* 368 F.Supp. 1009 (M.D. Fla. 1973), *aff'd,* 417 U.S. 901, 94 S.Ct... 2595, 41 L.Ed.2d 207 (1974).

The Florida Supreme Court has articulated the test as follows:

> A legislative determination essentially comprehended in a State statute is conclusive upon the Courts if *under any possible state of facts* the Act would be constitutional, assuming the supposable

state of facts to be true *in so far as they are not overcome by facts contrary thereto of which the courts must take judicial notice.*

*State ex rel. Adams v. Lee,* 122 Fla. 639, 166 So. 249, 254 (1935), *affirmed on rehearing,* 122 Fla. 670, 166 So. 262 (1936), *cert. denied,* 299 U.S. 542, 57 S.Ct. 15 (1936).

All that has to be shown to overcome the ruling of facial unconstitutionality is some set of facts, either known or assumed, that would support the statutes. So, the only relevant question is whether there is "any possible set of facts" under which the legislature could have properly enacted these sections. The defendants submit that such a possibility is demonstrated repeatedly herein and that the challenged statute is constitutional.

## III
## The Florida Experience — Section 905.27(1), Florida Statues

On two occasions, the Florida Supreme Court considered the relationship between the grand jury's role and function as against the claimed rights of others, and has sided with the grand jury in both instances.

In *Buchanan v. Miami Herald Publishing Co.,* 230 So.2d 9 (Fla. 1969), the court said:

> It is against the public policy of this State to allow civil suits for damages to infringe on the secrecy of the grand jury proceedings. The harm to the public interest from such suits outweighs the gain of the individual.

The court so ruled even though Art. I, §21, Fla. Const. 1968 provides that



> The courts shall be open to every person for redress of any injury and justice shall be administered without sale, denial or delay.

In *Miami Herald Publishing Co. v. Marko,* 352 So.2d 518 (Fla. 1977), the court held that Section 905.27(1), Florida Statutes, permitting repression of certain statements in a grand jury presentment about a person against whom no charges had been voted, was constitutional. The court thereby rejected the Miami Herald's claim that the law violates the First Amendment by denying access to public information and thereby impinging on the rights of a free press. The court's deference to legislative wisdom is instructive:

> In considering whether statements in a 'no indictment' grand jury report can be repressed on the ground that public officials may be exposed to criticism, scorn, or recommendations unfavorable to their reputation, it is essential to bear in mind the context in which the issue arises. Unlike the opportunity for refutation which is available when adverse character or reputational matters are disclosed during the course of a public trial, there is no comparable opportunity to challenge grand jury report disclosures contemporaneously with their publication. *These matters emerge from a grand jury process which has operated in secrecy, under the guidance of a prosecutor and the supervision of a judge to be sure,* but where there has been no right to challenge witnesses or to be represented by counsel. *It is possible, then, that the testimony and information presented to a grand jury, on which they must rely and report, is potentially one-sided and inaccurate. Thus, while one charged with the commission of a crime as a result*

*of this process has a full opportunity for public clarification of misleading data and personal vindication through a public trial, no comparable means of vindication exists for one whose character is impugned in a report unaccompanied by indictment.* It is undoubtedly for this reason that the *legislature has now afforded an opportunity to prevent the publication of unfavorable material through the repression of matter that 'is improper and unlawful'.* (Emphasis added)

352 So.2d at 520-521.

The primacy of grand jury secrecy and judicial supervision repeatedly recognized and relied on by federal courts under Rule 6(e) are vitalized by the Florida courts as to state grand jury proceedings governed by Chapter 905, Florida Statutes.

The logical extension of plaintiff's argument serves as the strongest basis for its rejection, for if a witness may disclose his own testimony and evidence presented, what is to prevent him from making similar disclosures as to what the witness observed or heard while before the grand jury. Moreover, what would prevent anyone of the listed persons in Section 905.27(1), Florida Statutes, (a grand juror, state attorney, assistant state attorney, reporter, stenographer or interpreter — or anyone else) from claiming the same entitlement under the First Amendment. It is submitted that if the statutory prohibition against the persons who fit into one of the enumerated specific categories applies to them as against the First Amendment, then the statutory exclusion as to "any other person appearing before the grand jury" applies equally as against any First Amendment claim.

The further effect of the vitalization of plaintiff's claim is to create a class of persons (witnesses appearing before the grand jury) who are treated differently from the other



classes embraced by the statute. The equal protection considerations embraced by plaintiff's claim here should be self-evident.

Florida's grand jury experience is demonstrated by the longstanding policy entrenched in the law that proceedings before the grand jury are secret. *Clein v. State,* 52 So.2d 117 (Fla. 1950), and under judicial supervision. The policy considerations behind the conducting of grand jury proceedings in secret are similar to those expressed in part I above, *See* 33 Fla.Jur.2d Juries, Section 151, with an additional point of emphasis: The rule of secrecy concerning matters transpiring in the grand jury room is also designed, not only for the protection of witnesses before the grand jury, but for that of the grand jurors themselves. The disclosure of evidence and testimony submitted in grand jury proceedings is narrowly drawn consistent with the overriding primacy of secrecy of grand jury proceedings and judicial supervision. *See* 33 Fla.Jur.2d Juries, Section 152.

A profound problem borne of plaintiff's claim is that a grand jury witness authorized by the First Amendment to disclose his own testimony is also permitted to disclose the questions posed by grand jurors and statements made by members of the panel. Taken together, the material or information disclosed may well tend to involve matters that the legislature and the courts have declared to be off limits consistent with the purposes of grand jury proceedings being held in secret which are set out throughout this memorandum of law.

## CONCLUSION

It is doubtful that plaintiff was called before the grand jury because of some expectation that he ultimately would report and publish on the panel's proceedings; it is more

reasonable to assume he was summoned because it was determined plaintiff possessed information material to an ongoing investigation.

The chilling effect on a Florida grand jury's ability to obtain any person's evidence consistent with the overriding principles of secrecy and judicial supervision when that person — particularly plaintiff — is free to disclose and publish under a First Amendment claim should be self-evident.

On balance, Section 905.27(1), Florida Statutes, represents policy choices by the Florida legislature well within the clearly-established parameters pertaining to grand jury practice and procedure, the primacy of secrecy and judicial supervision of the grand jury. The First Amendment does not permit a person who occupies one of the positions set out in the statute from disclosing grand jury proceedings with impunity. As demonstrated herein, the courts have supervised grand jury proceedings and, when the interests of justice require, provided for limited and controlled disclosure of grand jury proceedings under court jurisdiction and direction. Plaintiff's claim would remove the courts of Florida from any involvement in a decision by a witness to disclose his testimony, evidence presented to the grand jury, testimony of and evidence submitted by others observed or heard by the witness, discussions among the grand jurors, discussions between state attorney and the grand jurors, and on and on, without any judicial control or involvement. Plaintiff's First Amendment claim sweeps too broadly and too absolutely to be countenanced here.

In light of the above, plaintiff's claim for a temporary injunction must fail in that there is no substantial likelihood that he will prevail on the merits of his claim; the threatened harm of a temporary injunction permitting plaintiff to, in effect, "let the cat out of the bag" outweighs any perceived



threatened injury to the plaintiff; the granting of a preliminary injunction will do great violence to the primacy of secrecy accorded grand jury proceedings in, and supervision by, Florida courts; and the granting of a preliminary injunction would result in irreparable harm to the grand jury system as against plaintiff's claim that he wishes to receive some benefit through the publishing of grand jury proceedings, including his testimony.

In fine, there are well-founded and long-standing compelling state interests in the primacy of grand jury secrecy which transcend plaintiff's perceived First Amendment claim. Accordingly, defendants move for an Order dismissing plaintiff's action on the grounds that it fails to state a cause of action or, alternatively, to declare as a matter of law that plaintiff cannot under any circumstance establish a basis for his claim, thereby entitling the defendants to summary judgment as a matter of law.

Respectfully submitted,

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